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Respondents respectfully file this Reply Brief to the Petition for Certiorari filed by Northwestern Mutual Life Insurance Company as petitioner in the above case.

REPLY TO PETITIONER'S SHORT STATEMENT OF MATTER INVOLVED.

Petitioner's statement of issues fails to include one material issue and, as respondents view the record, contains (Petition, page 7) an erroneous statement that the respondent tax officials relied upon the Georgia Intangible Tax Act (Georgia Laws 1937-8, Ex. Sess. p. 156, Ga. Ann. Code, Section 92-114, et seq.) for their authority.

In addition to the issue of taxability, there was in the record at the time of trial an issue of discrimination raised by plaintiff's Fifth Amendment (printed transcript, pp. 107-109). Previous amendments of plaintiff attempting to raise an issue of discrimination on other grounds were excluded by the State Court for reasons which appear in a series of orders contained in the transcript and on each previous occasion that plaintiff sought to raise an issue of discrimination, plaintiff amended to meet objections pointed out by the State Court. It is the contention of respondents that this series of amendments by plaintiff eliminated all issues of discrimination contained in every amendment except the Fifth Amendment because, as a matter of State law, a party in a suit pending in the Courts of Georgia "having submitted to the ruling of the Court on the demurrer, and amended—to meet such ruling, cannot afterwards be heard to say that the amendment was not necessary."

The above quoted language is adapted from the decision of the Court of Appeals of Georgia in the case of

Brantley Company vs. Southerland, Sheriff, 1 Ga. App. 804, *Opinion 806,* 57 S. E. 960, *Opinion 961.*

With this brief introductory statement, we pass to the argument and citation of authorities which will be divided into the following sections:

1. An Analysis of the Issue of Discrimination in Light of the Record.

2. The Georgia Intangible Tax Act is not an Issue in this Case.

3. Northwestern Mutual has not Shown that its 30% Assessment Exceeds the Average Valuation at which Taxable Property was Generally Assessed in the County.

4. Under the Federal System the Property in Question is Subject to the Taxing Power of the State of Georgia and the Constitution of Georgia Forbade its Exemption.

1. An Analysis of the Issue of Discrimination in Light of the Record.

The Supreme Court of Georgia in a unanimous decision held (38 S. E. 2d, p. 800) that petitioner by yielding to the Trial Court's ruling on the First, Second, Third and Fourth Amendments waived its right to insist upon issues of discrimination not included in the Fifth Amendment (T 107-109). Accordingly, it was upon the issue of discrimination raised by the Fifth Amendment that plaintiff who is now petitioner in certiorari, went to trial.

This rule of Georgia practice that a party who amends his pleadings to meet the Court's ruling on demurrer cannot afterwards be heard to state that the amendment was unnecessary, is most tersely stated in the Third Edition of "Georgia Practice Rules" by the late A. W. Cozart, Section 146, under the caption, "Amending Prevents One from Complaining."

Georgia cases cited as authority for this ruling include:

Glover vs. Savannah, Florida & Western Railway Company, 107 Ga. 34, *third division of opinion, page 43,* 32 S. E. 876.

Brantley Company vs. Southerland, Sheriff, 1 Ga. App. 804, *first division of opinion 806,* 57 S. E. 960, *Opinion 961.*

Other cases holding to the same effect include:

Rivers, et al. vs. Key, et al., 189 Ga. 832 (1), 7 S. E. 2d 732.

Rome Railroad Company vs. Thompson, 101 Ga. 26 (11), *Opinion 32,* 28 S. E. 429, *Opinion 431, Col. 2.*

Accordingly, after plaintiff had elected by successive amendments to eliminate other issues of discrimination, plaintiff went to trial before a jury solely upon an issue of taxability and upon an issue of discrimination which is contained in plaintiff's Fifth Amendment.

Scope of Issue of Discrimination Pleaded by Fifth Amendment.

This Fifth Amendment appears on pages 107, 108 and 109 of the printed transcript and a careful reading of this Fifth Amendment shows that the material facts there pleaded regarding discrimination are confined to the following portions of this amendment:

(a) The latter portion of Paragraph 67 of the amended petition beginning with the words in the ninth line of Paragraph 67 (T 107) which read, "for that said Board of Tax Assessors, the defendants herein, adopted a plan and policy," and continuing through the remainder of Paragraph 67.

(b) Paragraph 68 of this Fifth Amendment (T 107-108) which charged that the defendants executed this plan of discrimination "wilfully, deliberately and systematically," etc.

(c) Following the allegations contained in Paragraphs 67 and 68 above quoted, plaintiff proceeded in Paragraph 69 (T 108) to plead the legal result of the alleged discrimination, claiming violation of the Fourteenth Amendment to the Federal Constitution and of the due process, equal protection and uniformity of taxation clauses in the Constitution of Georgia.

(d) Paragraph 70, which is the last paragraph of this Fifth Amendment (T 109) alleged generally, "by reason of the foregoing, said purported assessment is null and void—and the enforcement based thereon should be enjoined and the relief granted petitioner as prayed in the original petition."

Accordingly, plaintiff by this charge in plaintiff's Fifth Amendment left off for the first time all reference to the

Georgia Intangible Tax Act and pleaded, insofar as discrimination is concerned, a new case which it attempted to prove.

This Fifth Amendment does not contain a single word about the Georgia Intangible Tax Act and the Fifth Amendment does not attempt to charge discrimination because of alleged application to other species of property of preferred rates regardless of the effect that such irregularity may have had upon plaintiff's proportionate tax liability for the total tax burden of the county.

Thus, it becomes apparent why the Court in its order on the Fifth Amendment (T 112) added the language:

> "The previous orders on demurrers in this case are not changed by this order."

2. The Georgia Intangible Tax Act is not an Issue in this Case.

Respondents most insistently take exception to the continued attempt of petitioner in certiorari to seek to base a charge of discrimination upon the Georgia Intangible Tax Act or any provision therein contained.

The Georgia Intangible Tax Act which is codified in Sections 92-114, et seq. of the pocket part of the Georgia Annotated Code was an Act of the Legislature of Georgia approved December 27, 1937 (Georgia Laws 1937-8, Ex. Sess. pp. 156-170) which classified certain intangibles for taxation in Georgia *effective with the calendar year commencing January 1, 1938.*

This classification of intangible property was not even authorized in Georgia prior to the constitutional amendment proposed by the Legislature February 22, 1937 (Georgia Laws 1937, p. 39) and ratified at an election held by the people on June 8, 1937.

Prior to the adoption of this classification tax act which had been recently authorized by the constitutional amendment, both the Constitution and laws of Georgia required uniform taxation at the same rate for ad valorem purposes of all property without regard to its species.

Verdery vs. The Village of Summerville, 82 Ga. 138, *Opinion 140*, 8 S. E. 213, *Opinion 214*.

The assessment in question was made by a county board of tax assessors which derived its authority from a uniform law of Georgia first enacted in the year 1913 which is codified as Chapter 92-69 of the Georgia Code of 1933.

The Georgia Intangible Tax Act transferred *effective with the calendar year 1938*, to a separate and distinct State authority the function of assessing beginning with the year 1938 the intangibles that were classified by that act. Neither the caption nor the purpose of the Intangible Tax Act related or attempted to relate to the functions of county tax authorities for the year 1937 and previous years and the constitutional amendment ratified by the people of Georgia on June 8, 1937 did not authorize the Legislature to modify or abridge to any degree the authority of county officers over taxable property prior to its classification, nor did this constitutional amendment ratified June 8, 1937 authorize the forgiveness of any taxes owing by any person subject to tax in the State of Georgia for the year 1937 and prior years.

The forgiveness of such taxes was expressly forbidden by at least two other clauses of the State Constitution, namely, Article VII, Section II, Paragraph IV of the Constitution of 1877 (Code of 1933, Section 2-5005) and Article IV, Section I, Paragraph I of the Constitution of 1877 (Code of 1933, Section 2-2401).

The confusion engendered in this case by the persistent effort of the Northwestern Mutual to resort to this Georgia Intangible Tax Act in order to escape liability for taxable years prior to the effective date of the Georgia Intangible Tax Act will become crystal clear by the analysis presented in the next section of this argument.

The Trial Court's orders—first and last—on the issue of discrimination is comprehended in the Court's able analysis of constitutional discrimination contained in its order dated April 29, 1943 (pp. 84, 85 and 86 of the printed transcript) disallowing plaintiff's First Amendment.

The holdings of the Trial Court in this order are as follows:

First. That the Georgia Intangible Tax Act is not an issue in this case.

Second. The issue of discrimination must be determined separately as to each year's taxes.

Third. That during the years in question there were only two classes of property in Georgia with respect to taxation, that is, property subject to tax and property exempt from tax. Constitutional equality and uniformity required that each taxpayer in the county pay only his just proportion of the taxes to which all property was subject, according to the comparative value of his property and the total amount of taxes to be paid.

3. Northwestern Mutual has not Shown that its 30% Assessment Exceeds the Average Valuation at which Taxable Property was Generally Assessed in the County.

The Court's order dated April 29, 1943 closed with two paragraphs (T 86) inviting plaintiff to amend to reduce its tax liability from a tax on a 30% assessment to a tax on a 25% assessment, which amendment plaintiff consistently refused to file.

The analysis by the Trial Judge of the requirements of constitutional equality were based upon the following decisions:

(a) Taylor, et al. vs. Louisville & Nashville Railroad Company (C.C.A 6th Circuit, 7/5/98) 88 Fed. 350, *Opinion 363;*

(b) Verdery vs. The Village of Summerville, 82 Ga. 138, *Opinion 140,* 8 S. E. 213, *Opinion 214;* and

(c) Sioux City Bridge Company vs. Dakota County, 260 U.S. 441, 67 L. Ed. 340, 43 S. Ct. 190, 28 A.L.R. 979.

This case of the Northwestern Mutual Life Insurance Company is a most remarkable case in that Northwestern Mutual comes into Court with an admission in its pleadings

that its property has been assessed at only 30% of market value (printed Petition for Certiorari, p. 3, line 16; Paragraph 35 of Petition, Transcript pp. 57 and 58).

Constitutional equality is not intended to give a preference to a taxpayer whose property is assessed at a valuation below the average.

The question of comparative equality in the assessment of different species of property and the factors necessary to be applied to the assessment of a given taxpayer to increase or reduce it to the common level is analyzed in the case of

Taylor, et al. vs. Louisville & Nashville Railroad Co., (C.C.A. 6th Circuit) 88 Fed. 350, *Opinion 362, 363.*

While in other cases the courts have determined generally that a given taxpayer was or was not entitled to equitable relief, depending upon whether or not the tax demanded was more or less than the taxpayer's equal share of taxes, this Taylor case contains the only comprehensive analysis of the rules of equality as applied to the assessment of various species of property at different ratios of value.

The Supreme Court of New Hampshire made a comparable analysis in the case of

Amoskeag Mfg. Co. vs. The City of Manchester, 70 N.H. 200, 46 Atl. 470.

If the order of Hon. Paul S. Etheridge dated April 29, 1943 (T 84-86) is placed alongside the Taylor and Amoskeag Mfg. Co. decisions, it will at once appear at Judge Etheridge applied with great skill the principles of exact equality to the facts of this case.

By the last two paragraphs of this order (T 86), Northwestern Mutual was given opportunity to seek a reduction of its 30% assessment to a 25% assessment. However, Northwestern Mutual rejected this offer, amended on four subsequent occasions and persisted in its position that it would pay all the tax assessed or none at all. Authorities cited in the first division of this argument sustain the argument that Northwestern Mutual Life Insurance Company must now abide by its election.

In our opinion, this Northwestern Mutual case is the only case in the books (with the exception of the Montgomery case) where a taxpayer assessed at only 30% of value has sought a reduction below the average at which taxable property in the county is assessed.

The Circuit Court of Appeals decision in the case of Taylor vs. Louisville and Nashville Railroad Company, 88 Fed. 350, *Opinion 363,* is, in our opinion, the most direct and controlling authority in point of all the cases on discrimination. This Circuit Court of Appeals decision *was cited and followed* by the Supreme Court of the United States in Green vs. Louisville and Interurban Railroad Company, 244 U. S. 499, *Opinion 516 and 517,* and also Sioux City Bridge Company vs. Dakota County, 260 U. S. 441, *Opinion 446.*

It is not necessary to refer to the question of *comparative equality* in the average case on discrimination because cases on discrimination almost without exception relate to one individual or a group of individuals assessed at a valuation higher than the average valuation and generally at 100% of market value.

Because Mr. Justice Taft in the case of Taylor vs. Louisville and Nashville Railroad Company (Opinion, 88 Fed. p. 363) analyzed the law as applied to a taxpayer with a favored assessment, we consider this Circuit Court of Appeals decision the most controlling authority.

Sioux City Bridge Company vs. Dakota County, 260 U. S. 441, supra, related to a taxpayer who had been assessed at approximately 100% of value, whereas other taxpayers subject to the same tax were assessed at between 49% and 56% of value (see Opinion, pp. 443 and 446).

It is significant that the Supreme Court decision in the Sioux City Bridge Company case was written by the same Judge who on circuit wrote the opinion in Taylor vs. Louisville and Nashville Railroad Company (88 Fed. 350) and that the headnote in the Sioux City Bridge Company case contains an expression which reconciles all authorities and shows their application to the Northwestern Mutual case

which is now before the Court. We here refer to the second headnote in Sioux City Bridge Company vs. Dakota County, 260 U. S. 441, which reads as follows:

> "The owner aggrieved by this discrimination is entitled to have his assessment reduced to the *common level,* since by no judicial proceeding can he compel reassessment of the great mass of such property at its true value as the law requires." (Italics ours.)

We respectfully close this section of the argument by calling the Court's attention to the fact that Northwestern Mutual has not shown, and has not attempted to show, by any of its pleadings or evidence that other taxpayers of Georgia were *generally assessed,* or that the "common level" of assessment of other property, was as low as the 30% assessment which it enjoyed.

This inability of Northwestern Mutual to plead or to prove discrimination accounts, as we believe, for its desperate effort to build up a case out of the passage on December 27, 1937 of the Georgia Intangible Tax Act which transferred effective January 1, 1938 to a new and separate authority jurisdiction to assess for the years 1938 and thereafter the particular species of property upon which Northwestern Mutual declined to pay its uniform ad valorem tax for the year 1937 and years prior thereto.

It is not every case of unequal assessment that entitled a taxpayer to relief. The assessment of 30% on the property of petitioner in certiorari may be less than the assessment of property generally subject to tax in the county.

The burden of proof to show an assessment higher than the common average rests upon Northwestern Mutual Life Insurance Company.

Georgia Railroad and Banking Company vs. Wright, 125 Ga. 589 *Opinion 604-606,* 54 S. E. 52, *Opinion 58, Col. 2, and 59.*

Sunday Lake Iron Company vs. Wakefield, 247 U. S. 350, 353, 62 L. Ed. 1154, 38 S. Ct. 495.

Chicago Great Western Railway Company vs. Kendall,

266 U. S. 94, *Opinion 98 and 99,* 69 L. Ed. 183, 45 S. Ct. 55.

4. Under the Federal System the Property in Question is Subject to the Taxing Power of the State of Georgia and the Constitution of Georgia Forbade its Exemption.

The test for State taxability applied by the Supreme Court of the United States is:

> "Whether the taxing power asserted by the State bears fiscal relation to protection, opportunities and benefits given by the State. The simple but controlling question is whether the State has given anything for which it can ask return."

State of Wisconsin vs. J. C. Penney Company, 311 U. S. 435, *Opinion 444,* 61 S. Ct. 246, *Opinion 250, Col. 1,* 85 L. Ed. 267.

The fundamental relation between payment of ad valorem taxes and business opportunity is declared by the Supreme Court of Georgia in language comparable to that of the controlling United States Supreme Court.

Armour Packing Company vs. City Council of Augusta, 118 Ga. 552, *Opinion 554,* 45 S. E. 424, *Opinion 424 and 425.*

The Supreme Court of Georgia in its first decision in this case (Suttles vs. Northwestern Mutual Life Insurance Company, 193 Ga. 495, 19 S. E. 2d 396) did find that because of the particular facts of this case a "substantial connection" existed between a loan business conducted by the Northwestern Mutual Life Insurance Company in Georgia and the property sought to be taxed.

With respect to the delivery in Fulton County, Georgia, by the salaried loan agent to the borrower of the checks which were the consideration for the loans in question, the Supreme Court of Georgia said (Opinion, 193 Ga. 509, 19 S. E. 2d p. 405, Column 2):

> "The case would not be different if the company had in each instance sent a bag of money to be delivered by

Durant to the borrower; and if that had been done, we think the company would have been doing business in Georgia, and none the less so, from a legal standpoint, than if all that might have been so used had been sent to him in one lot, for delivery from time to time, on particular instructions as loans were made."

The decision of the Supreme Court of Georgia as to whose agent Mr. Durant was and as to what constitutes agency is a decision of a State Court on a State question. No substantial federal question is presented by a challenge to that State Court ruling.

The State Court having found that a substantial connection existed between the credits sought to be taxed and the acts locally performed by the general loan agent of Northwestern Mutual, the basis of the State Court's decision is the requirements of the State Constitution.

Suttles vs. Northwestern Mutual Life Insurance Company, 193 Ga. 495 (2), *Opinion 506,* 19 S. E. 396, *Opinion 403, 404.*

Decision on second appeal to State Court: Northwestern Mutual Life Insurance Company vs. Suttles, 38 S. E. 2d 786, *Opinion 796.*

The decision of the State Court on the question of taxability is also sustained by the following Federal authorities:

Chattanooga National Building & Loan Ass'n vs. Denson, 189 U. S. 408, *Statement of Facts, p. 412,* 47 L. Ed. 870, 23 S. Ct. 630.

Metropolitan Life Insurance Company vs. New Orleans, 205 U. S. 395, *Opinion 397, 400, 401,* 51 L. Ed. 853, 27 S. Ct. 499.

Bristol vs. Washington County, 177 U. S. 133, 44 L. Ed. 701, 20 S. Ct. 585.

(See particularly comment on Bristol vs. Washington County in Metropolitan Life Insurance Company vs. New Orleans, 205 U. S. at page 401, supra.)

CONCLUSION

In the opinion of respondents the above analysis and authorities show conclusively that no substantial federal question is presented by the petition for certiorari.

It is our opinion that the decisions of the Supreme Court of the United States cited under Division 4 of this argument demonstrate beyond question that the property sought to be taxed was within the orbit of the State taxing power and that the State was free to apply to the property in question the requirements of its own Constitution and laws regarding taxation.

We also believe that Northwestern Mutual with its 30% assessment has not made out a case on discrimination. Taxpayer's evidence on the issue of discrimination is outlined in the Statement of Facts in the Georgia Supreme Court decision to which this petition for certiorari is filed and will not be repeated here.

Insofar as the Georgia Intangible Tax Act is concerned, the State Court's Decision (Opinion, 38 S. E. 2d, page 798, Col. 2) that the power of the County Tax Assessors with respect to taxes for the year 1937 and prior years is not affected thereby, is certainly a State Court's decision on a State question and gives no right to review by the Supreme Court of the United States.

Respectfully submitted,

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Due and legal service of the foregoing Reply Brief acknowledged; copy received. All other and further service and notice waived.

This December ....., 1946.

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